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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re JAMES MICHAEL YANCY

on Habeas Corpus.

G032558

(Super. Ct. No. M8476)

O P I N I O N

Original proceedings; petition for a writ of habeas corpus to file a late notice of appeal. Petition granted.

Diane Nichols for Petitioner.

Bill Lockyer, Attorney General and Robert M. Foster, Deputy Attorney General, for Respondent.

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THE COURT:\*

James Michael Yancy seeks relief from the failure to file a timely notice of appeal. The petition is granted.

In October, 2002, James Michael Yancy was committed pursuant to the Sexually Violent Predator Act. (Welf. & Inst. Code, § 6600 et seq.) According to Yancy's declaration, on the day the jury returned with a decision, he asked trial counsel to file a notice of appeal on his behalf, and trial counsel advised him he would do so. According to Yancy, he repeatedly asked trial counsel about the status of his appeal on a number of occasions, and counsel assured him that the appeal had been filed.

According to a declaration filed by trial counsel, he prepared a notice of appeal on Yancy's behalf. When counsel received a call from Yancy that he had not heard anything about the appeal, he checked his office file and discovered the notice of appeal had not been filed.

The Attorney General does not oppose Yancy's request for relief to file a late notice of appeal without the issuance of an order to show cause. (*People v. Romero* (1994) 8 Cal.4th 728.)

The principle of constructive filing of the notice of appeal should be applied in situations where counsel advises a criminal defendant that he will file a notice of appeal on his behalf and counsel fails to do so in accordance with the law. (*In re Benoit* (1973) 10 Cal.3d 72, 87-88.) This is because a trial attorney has a duty to file a proper notice of appeal, or tell the client how to file it himself. In this case, counsel advised Yancy that he would file a notice of appeal on his behalf and he did not. Yancy's reliance on counsel's promise to file a notice of appeal entitles him to the relief requested.

The petition is granted. On petitioner's behalf, attorney Diane Nichols is directed to prepare and file a notice of appeal in Orange County case number M8476, and

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\* Before Sills, P. J., Rylaarsdam, J., and Fybel, J.

the Clerk of the Superior Court is directed to accept the notice for filing if presented within 20 days of this opinion becoming final. Further proceedings, including the preparation of the record on appeal, are to be conducted according to the applicable rules of court. In the interest of justice, the opinion in this matter is deemed final as to this court forthwith.